STATE OF MICHIGAN 84TH DISTRICT COURT

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DISTRICT JUDGE

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ATTORNEY MAGISTRATE

June 21, 2012

Mr. Corbin R. Davis
Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2010-34

Dear Mr. Davis:

I am writing to suggest that neither proposal to amend MCR 6.419 be adopted by the Court.

A directed verdict of acquittal granted under our current rule will now generally escape appellate review because of the constitutional prohibition against double jeopardy. This result can now be avoided only if the judge invites prosecutorial appeal by reserving the decision until after the jury returns a verdict. Then, if a guilty jury verdict is received before the motion for a directed verdict of acquittal is granted, a successful appeal by the prosecutor would result in the reinstatement of the jury verdict, without further trial proceedings that would implicate double jeopardy. Judges now insulate their directed verdicts of acquittal from appellate review by acting routinely -- by making the ruling immediately after the motion is made and before the jury returns a verdict.

Alternative A enhances trial judges' discretion to allow for appellate review of directed verdicts of acquittal by liberalizing the circumstance in which the decisions may be reserved. Under the current rule a judge cannot reserve a decision on a motion for directed verdict if the motion is made before the defendant presents proofs. It is thought that the defendant should know of the judge's decision before incurring the risk of presenting a defense. This now prevents judges from orchestrating the unusual circumstance that would allow for appellate review of directed verdicts granted as a result

of early motions. Alternative A permits a judge to reserve a decision on every motion for directed verdict, whether it is made before the defendant presents proofs or thereafter. But this change imposes the unfair burden on the defense that our current rule seeks to avoid. And the prosecutor's ability to appeal would still depend on the trial judge's inclination to employ an exceptional process to permit his or her decision to be reviewed.

Alternative B allows trial judges to reconsider directed verdicts of acquittal and requires judges to stay proceedings to allow prosecutors to seek interlocutory appellate relief if they don't. There is a danger that this process will be overused, and will impose an undue burden on trial and appellate courts. The minimum 24 hour window to complete an appeal seems unrealistic to me, considering the apparent necessity of presenting an entire trial record to the Court of Appeals within that time frame. While dicta in *Smith v Massachusetts* suggest that a judge's prompt reconsideration of a verdict of acquittal might avoid double jeopardy implications, we have no reason to believe that a judge's denial of reconsideration and reversal on appeal, as contemplated by Alternative B, would pass constitutional muster.

The current court rule is imperfect, and it is based upon the dubious premise that trial judges are likely to complicate proceedings before them to encourage that their rulings be reversed. But in my opinion, neither of the proposed alternatives significantly improves this procedure, and each introduces additional problems and concerns. I thank the Court for considering my comments.

Very truly yours,

Hon. David A. Hogg
District Judge